



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

(Petitioner)  
(Petitioner address)

DECISION

MDV-44/45948

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**PRELIMINARY RECITALS**

Pursuant to a petition filed September 5, 2000, under Wis. Stat. § 49.45(5) (1997-98), to review a decision by Outagamie County Health and Human Services (County) in regard to the Medical Assistance (MA) Community Options Program (COP)-Waiver program, a hearing was held on October 18, 2000 in Appleton, Wisconsin. At petitioner's request the record was held open until November 3, 2000.

The issue for determination is whether petitioner is ineligible, due to divestment of assets, for the MA COP-Waiver program from February 1999 through the end of March 2001.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(not present at October 18, 2000 hearing)

Represented by:

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LLP  
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Wisconsin Department of Health and Family Services  
P.O. Box 7850  
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BY: Sue Paveletzke, ESS II  
Sue Verbrick, ESS II  
Outagamie County Health and Human Services  
Economic Support Division  
Human Services Building  
Level 2  
401 South Elm Street  
Appleton, Wisconsin 54911-5985

**OTHER PERSONS PRESENT:**

petitioner's daughter  
petitioner's son

HEARING OFFICER:

Sean P. Maloney  
Administrative Law Judge  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxx-xx-xxxx) is a noninstitutionalized individual and a resident of Outagamie County, Wisconsin.
2. On July 20, 2000 petitioner applied for MA COP-Waiver. Exhibit #2.
3. Petitioner made gifts in February 1999 and March 1999 in the total amount of \$104,529.82. Exhibits #2 & #3.
4. None of petitioner's divestments involved trusts. Exhibits #2 & #3.
5. The County sent petitioner a manual "Negative Notice" dated August 4, 2000 stating, in relevant part, as follows: "The application for COP-Waiver Medical Assistance has been denied due to divestment of assets in 02/99 & 03/99." Exhibits #1A & #2.

**DISCUSSION**

With certain exceptions not applicable here, if an individual, or another person acting on behalf of the individual, transfers assets for less than Fair Market Value (FMV) on or after the individual's look-back date (such transfers are commonly known as "divestment"), the individual is ineligible for COP-Waiver services under MA for a specified time period. 42 U.S.C. § 1396p(c)(1)(A) (Supp. 2000); Wis. Stat. § 49.453(2)(b) (1997-98).

There is no dispute that the gifts noted in Finding of Fact #3, above, were divestments by petitioner. Petitioner does not deny this. Exhibit #1.

The period of MA ineligibility due to divestment is known as the "penalty period". The penalty period begins with the month of divestment and extends for the number of months that result from dividing the divested amount by the average nursing home cost to a private pay patient. 42 U.S.C. § 1396p(c)(1)(E) (Supp. 2000); Wis. Stat. § 49.453(3)(b) (1997-98). The average nursing home cost to a private pay patient is \$3,929.00. MA Handbook, Appendix 14.5.0.; See also, BWSP Operations Memo No.: 00-65; File: 2731; Date: 09/12/2000. The County at first used \$3,833.00 as the average nursing home cost to a private pay patient. Exhibit #2. The County now agrees that \$3,929.00 is the correct amount to be used.

"Multiple divestments" are 2 or more separate divestments made within a 36 month period before the MA application date or the date of entering an institution or at any time thereafter. For multiple divestments the penalty period is calculated as follows:

1. Add together all the divested amounts of transfers in the look-back period or any time thereafter that are connected in any of the following ways:
  - a. transfers that occur in the same month;
  - b. transfers that occur in both months of a period of any 2 consecutive months;
  - c. transfers with a penalty period that extends into a month in which there is another transfer; or,
  - d. transfers with a penalty period that extends into the month immediately preceding a month in which there is another transfer.
2. Calculate the penalty period.

MA Handbook, Appendix 14.6.0.

In this case the divestments noted in Finding of Fact #3, above, are multiple divestments and satisfy the criteria in 1.a.-d., above. Therefore, all the divestments noted in Finding of Fact #3, above, are added together and divided by the average nursing home cost to a private pay patient (\$3,929.00) in order to arrive at the penalty period. All fractions are rounded downward. MA Handbook, Appendix 14.5.0. This gives a penalty period of 26 months ( $\$104,529.82 / \$3,929.00$  equals 26.6047 rounded downward to 26).

As noted above, the penalty period begins with the month of divestment and extends onward. The first month of divestment relevant here is February 1999; 26 months from February 1999 is March 2001. Thus, the County was correct when it concluded that petitioner is ineligible for MA COP-Waiver from February 1999 through the end of March 2001 due to divestment of assets.

Petitioner does not argue that she has not divested. Instead, petitioner argues that the penalty period for her divestments must end April 1, 2000. Exhibit #1, p. 3. Petitioner argues that she divested beginning in April 1997, that the maximum penalty period for divestments is 36 months, and that her penalty period must therefore end April 1, 2000. Petitioner's argument must fail for two reasons.

First, any gifting of assets that took place in prior to July 1997 cannot be divestment since time periods prior to July 1997 are not within the 36-month look-back date that applies in this case.

For a noninstitutionalized individual the "look-back date" is at 36 months (unless a trust is involved, in which case it may be 60 months) before the date on which the individual applies for MA or, if later, the date on which the individual, or someone acting on behalf of the individual, disposes of assets for less than FMV. 42 U.S.C. § 1396p(c)(1)(B)(II) (Supp. 2000); Wis. Stat. § 49.453(1)(f)2. (1997-98).

This case does not involve trust and the look-back date is therefore, at the earliest, 36 months prior to the date on which petitioner applied for MA -- which was July 20, 2000. When calculating the look-back date the counting starts with the month before the more recent of the date of application or the date of disposal of assets at less than FMV. See, MA Handbook, Appendix 14.3.0. In case, the earliest the look-back date can be is 36 months prior to July 2000, which is July 1997. This is because the date of the application in this case is July 20, 2000. Thus, July 20, 2000 is the earliest date that can be used when calculating the look-back date. If the date of petitioner's disposal of assets at less than FMV is earlier it cannot be used. 42 U.S.C. § 1396p(c)(1)(B)(II) (Supp. 2000); Wis. Stat. § 49.453(1)(f)2. (1997-98).

Second, it is simply not correct that the maximum penalty period is 36 months. There is no maximum penalty period. The legal citations petitioner provides to support her argument [“§1396p(E)” and “42UCSC§1396P”] do not exist. Exhibit #1, p. 2 & Exhibit #1D. It is true that there is no penalty period for a gift if the gift is made prior to the look-back date. However, this is much different than saying that there is a maximum penalty period. Divestments, which, by definition, must be made after the look-back date, have no maximum penalty period.

The Division of Hearings and Appeals (DHA) has addressed these same arguments, in the context of an institutionalized individual, in at least one prior case. DHA reached the same result. See, DHA Case No. MDV-44/45328 (Wis. Div. Hearings & Appeals October 13, 2000) (DHFS).

### **CONCLUSIONS OF LAW**

For the reasons explained above, petitioner is ineligible, due to divestment of assets, for MA COP-Waiver from February 1999 through the end of March 2001.

**NOW, THEREFORE, it is**

### **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

### **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as “PARTIES IN INTEREST.”

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on the Wisconsin Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this \_\_\_\_\_ day  
of \_\_\_\_\_, 2000.

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Sean P. Maloney  
Administrative Law Judge  
Division of Hearings and Appeals  
11132000/SPM

xc:

Outagamie County Health and Human Services  
Susan Wood, DHFS